IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL Nos. 1182 of 1995, 73 of 1996, 74 of 1996 and 171 of 1996

For Approval and Signature:

HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

AYUBKHAN @ BUCHIO MOHMEDKHAN

Versus

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Appearance:

1. Criminal Appeal No. 1182 of 1995

MR M.A. BUKHARI for Mr. M.H. BAREJIA for the appellant
MR. N.D. GOHIL, APP, for the Respondent

2. Criminal Appeal No. 73/1996

MR. M.A. BUKHARI for Mr. M.H. Barejia for the appellant
Mr. N.D. GOHIL, APP, for the respondent

3. Criminal Appeal No. 74/1996

Mr. M.A. Bukhari for Mr. M.H. Barejia for the appellant
Mr. N.D. GOHIL, APP, for the respondent

4. Criminal Appeal No. 171 of 1996

Mr. N.D. Gohil, APP, for the appellant
Mr. M.A. Bukhari for Mr. M.H. Barejia, for respondent No. 1
Notice served to respondent Nos. 2 to 5

CORAM : HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE K.M.MEHTA

Date of decision: 17/11/2003

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE KSHITIJ R.VYAS)

1. The appellants in these appeals have challenged the judgement and order dated 22.12.1995 passed in Sessions Case No. 161 of 1995 by the learned Additional City Sessions Judge, Ahmedabad. The learned Judge by the impugned judgement convicted accused No.1,2,3,4 and 6 for the offence punishable under Section 147 of the I.P.C. and each of them is ordered to undergo rigorous imprisonment for one year.

2. Each of the accused Nos. 1, 2,3,4 and 6 is convicted for the offence punishable under Section 148 of the I.P.C. and each of them is ordered to undergo rigorous imprisonment for one and half years.

3. Each of the accused Nos. 1,2,3,4 and 6 is convicted for the offence punishable under Section 188 read with Section 149 of the I.P.C. and each of them is ordered to undergo rigorous imprisonment for a period of one month.

4. Each of the accused Nos. 2, 3 and 4 is also convicted for the offence punishable under Section 307 read with Section 149 of the I.P.C. and each of them is ordered to undergo rigorous imprisonment for a period of four years and each of them is directed to pay fine of Rs. 1500/- and in default to suffer rigorous imprisonment for four months.

5. Each of the accused No. 1 and 6 is convicted for the offence punishable under Section 307 read with Section 149 of the I.P.C. and each of them is ordered to undergo rigorous imprisonment for a period of three years and each of them is ordered to pay fine of Rs. 1500/- and in default to suffer rigorous imprisonment for four months.

6. Accused No. 2 is convicted for the offence punishable under Section 25(1)(a) and (b) of the Arms Act and is ordered to undergo rigorous imprisonment for a period of six months.

7. The learned judge also directed that, fine amount, if any, when paid shall be handed over to the victims of the incident, namely, (1) Nareshkumar @ Sonu Sindhi and (2) Bhupendra Jani, in equal proportion. It is further directed that the period of detention already undergone by the accused is ordered to be given set off conviction to the convicted accused persons.

8. The learned trial Judge however acquitted original accused Nos. 5 and 7 from the charges levelled against them.

9. Accused No. 1 Ayubkhan alias Buchio Mohmedkhan preferred Criminal Appeal No. 1182 of 1995. Shahmohmed Valimohmed and Shaikhmohmed Valimohmed, accused No. 3 and 4 have preferred Criminal Appeal No. 73 of 1996. Accused No. 2, Gulabkhan Amirkhan Pathan has preferred Criminal Appeal No. 74 of 1996. All the above said appellants have challenged the judgement and order of conviction and sentence passed against them. State of Gujarat had preferred Criminal Appeal No. 171 of 1996 for enhancement of sentence of accused No. 1,2,3,4 and 6. It may be stated that State of Gujarat has also filed Criminal Appeal No. 170 of 1996 challenging the order of acquittal passed by the learned trial Judge acquitting original accused Nos. 5 and 7, namely, Nazir Mohmed Ali Mohmed and Sabirhusein Mamadubhai. However, a Division Bench of this Court (to which I was a party i.e. K.R. Vyas, J) dismissed the appeal at the admission stage on 23.9.1996.

10. The facts of the present appeals, in nutshell, are stated as under:

The complainant Raju Babulal, PW 1, at Exh. 25 had filed a complaint at Exh. 26 before the Kagdapith Police Station on 28.12.1992. It is stated therein that

on 28.12.1992 in the city of Ahmedabad communal riots had spread on account of demolition of Babri Masjid at Ayodhya on 6.12.1992. The situation in the city was tense including the area of Behrampura. The complainant being the follower of deity of Meladi Mata, used to pay visit to the said temple which is situated at Behrampura area. At the time of "Aarti" at about 6.30 p.m. on the date of the incident i.e. on 28.12.1992 he had gone to the said temple for offering prayer along with his friends. At about 7.00 p.m. on the said day after offering prayers, while they were returning from the temple, when they reached near the S.T. quarters near Ansari Hotel, they saw some persons near the corner of Jamnadas chawl with weapons. According to the complainant, they were Ayubkhan alias Buchio Mohmedkhan A-1, Gulabkhan Amirkhan A-2, Akhtarhusein @ Machhi Riyazhusein A-6, servant of Gulabkhan; Shah Mohmed Vali Mohmed A-3, Shaikh Mohmed Vali Mohmed A-4 and others. No sooner the complainant and his friends reached the spot where the accused were standing, A-2 fired from his revolver at Sonu Sindhi, one of the friends of the complainant. Immediately, thereafter A-1 fired shot from his gun. Because of sudden firing resorted by these two accused persons without any provocation from the complainant and his friends, the complainant and others started running away from the said place. In the process of such running, one Sonu Sindhi fell down on the road and one Bhupendra Jani also fell down on the road. It is further stated by the complainant that while running Rajkumar Sharma and the complainant also fell down near the public lavatory. In the meanwhile, Bhupendra Jani was attacked by A-3 and A-4 by the swords which they were carrying. They also followed the complainant and others for attacking the complainant and his friends. Ultimately, the complainant ran towards Meladi Mata temple in order to save himself from the attack. In the meantime, police party came there and therefore the accused fled away. The police took the injured persons to V.S. Hospital for treatment. The complaint filed by the complainant was registered at Kagdapith Police Station for the offences punishable under Section 143, 147, 148, 149, 307, 188 I.P.C., Section 135(1) of the Bombay Police Act and Sections 3 and 5 of the TADA Act.

11. On the basis of the complaint, investigation was carried out by P.S.I., Mr. R.C. Patel. After completing the usual investigation, the accused were arrested. On the basis of sufficient evidence available against the accused, charge-sheet came to be filed in the Sessions Court. It appears that thereafter the case was transferred to Designated Court for final hearing.

Charge was framed against 20 accused persons and the Designated Court by its judgement and order dated 29.4.1994 acquitted 13 persons and convicted 7 accused. It appears from the record that the seven accused filed Criminal Appeal No. 514 of 1994 before the Supreme Court. It also further appears that State of Gujarat had also filed appeal against the order of acquittal in favour of 13 accused. The Hon'ble Supreme Court, it appears that without going into the merits of the case, set aside the judgement of the Designated Court on the ground of sanction only and remanded the case to the Court of Sessions Judge for fresh trial in accordance with law.

12. The learned City Sessions Judge, as observed earlier, after appreciating the evidence on record, passed the order of conviction and sentence. Hence these appeals.

13. We have heard Mr. M.A. Bukhari for Mr. Barejia, learned counsel for the accused and Mr. N.D. Gohil, learned A.P.P. for the State. Mr. Bukhari, learned counsel for the accused after taking us through the entire evidence on record, submits that the trial Court has committed an error in relying the evidence of PWs. He submits that PWs are not trust-worthy, reliable and therefore their evidence is required to be discarded. He further submits that there is no sufficient evidence to connect accused No. 1 Ayubkhan alias Buchiyo Mohmedkhan. In the submission of Mr. Bukhari, learned counsel for the accused, about the alleged firm arm, which is a country made pistol, the same has not been recovered from accused No. 1 and there is no panchnama either discovery or recovery as to the said firm arm at the instance of accused No. 1 or otherwise. According to Mr. Bukhari there was no incriminating evidence against accused No. 1 that he had fired any shot and injury has been caused to the person particularly the victim Sonu Sindhi alias Naresh. As far as the other accused are concerned, it is the submission of Mr. Bukhari that the accused are not part and parcel of unlawful assembly and therefore no conviction could have been recorded under Sections 147, 148, 149 read with Section 307 of the I.P.C.

14. Mr. Gohil, learned A.P.P., on the other hand while supporting the judgement of the trial Court, submits that the accused were armed with revolver and had fired towards the witnesses. Moreover, accused Nos. 3, 4 and 6 were also armed with sword and they have caused serious injuries to both the victims. Mr. Gohil submits

that the manner in which the incident had taken place and particularly it was curfew time and the accused who were armed with deadly weapons attacked the persons of Hindu community who were absolutely unarmed and returning from attending "aarti" in Meladi Mata Temple, the learned trial Judge ought to have awarded minimum sentence of seven years to each of the accused for the offence punishable under Section 307 of the I.P.C.

15. The prosecution to bring home charge levelled against the accused has examined as many as 14 witnesses. Four out of them are eye witnesses and two out of four are injured witnesses. They are Bhupendra Jani at Exh. 28 and Nareshkumar PW 3 at Exh. 30. Raju Babulal Patwa at Exh. 25 the complainant and Abhaykumar Ramsing, PW 4, at Exh. 31 have witnessed the incident as they also went to offer prayers when the incident took place. Dr. Arpit Devendra Patel, PW-13 at Exh. 71, who examined injured Naresh has produced injury certificate at Exh. 72. Likewise Dr. Dilip L. Trivedi, PW 14, at Exh. 74 who examined injured Bhupendra Jani has produced injury certificate at Exh. 76.

16. PW-1 Raju Babulal Patwa, Exh. 25, the complainant, in his oral evidence has stated that accused No. 1, 2,3, 4 and 6 were present at the time of incident. He has involved the said accused and also identified accused Nos. 1, 2,3,4 and 6. According to him, out of the above five accused persons, accused No. 1 and 2 had revolvers in their hands and accused Nos. 3,4 and 6 had sword in their hands. Even though in the complaint at Exh. 26 he has not stated that accused No. 6 was having sword in his hand, however, in the evidence he has stated that accused No. 6 was having sword in his hands. This is the only improvement in his evidence. According to him while he and his friends reached near the scene of offence accused No. 1 fired shot from his revolver at Naresh alias Sonu Sindhi who sustained injuries on his right elbow. He has deposed that in the meanwhile accused No. 2 also fired from his revolver and because of sudden firing the complainant and his friends started running away in order to save their lives. In the process Sonu Sindhi and Bhupendra Jani fell down on the road near lavatory block. At that time Bhupendra Jani was attacked by accused No. 3 and 4. Bhupendra Jani, PW 2, Exh. 28, in his evidence has stated that since more than 30 years he is staying in the vicinity of Behrampura area particularly in the S.T. Staff quarters situated near the scene of offence. He has clearly supported the version of the complainant about the violence started by the accused. He clearly involved

accused No. 6 being the member of the mob. According to Bhupendra Jani, accused No. 6 gave a sword blow on his (witness) head and because of that he fell down and sustained injuries. According to him, accused Nos. 2, 3 also gave blow on his back. He has deposed that Sonu Sindhi also sustained injuries. He was taken to V.S. hospital for treatment and was treated as indoor patient where he remained for 10 days. He identified accused No. 6 in the Court.

17. Naresh @ Sonu Sindhi, PW-3 at Exh. 30 is examined. He is a resident of Behrampura area in Mahimnagar society which is nearer to the scene of offence. After giving details about the visit of Meladi Mata Temple in the evening with his friends which is in conformity with the evidence of the complainant, he deposed that he saw mob of Muslim persons near Ansari Hotel shouting "Maro, Kapo, Jivata Java Devana nathi". According to him, accused No. 2 fired from his revolver and caused injury to him. According to him, accused No. 1 also fired from his revolver upon his friends. Thus, according to this witness, both accused No. 1 and 2 fired from the revolvers. Not only that, he identified both the accused.

18. Evidence of PW 4 Abhaykumar Ramsing, at Exh. 31 is also in line with the evidence of other PWs. According to him, he saw accused Nos. 3 and 4 who were giving blows on the back of Bhupendra Jani. He has deposed that accused No. 2 had fired from his revolver. Even though he saw accused Nos. 1 to 7 in the mob and identified all the accused before the Court, he has not deposed that accused Nos. 5, 6 and 7 had deadly weapons in their hands. The learned trial Judge while appreciating the evidence of this witness has rightly observed that in the examination-in-chief he (witness) has identified only four accused and subsequently he has tried to involve all the accused and identified them before the Court. However, in the cross-examination he has clearly admitted that it is true that in the police statement he has not stated that while looking behind he had seen accused Nos. 3 and 4 giving blow of sword on the back of Bhupendra Jani. According to the learned trial judge this witness has made improvement in his version. Likewise, he has not involved accused Nos. 5 and 7 stating that they were having any arms in their hands.

19. From the evidence of the above witnesses, it is clear that they have identified and involved the accused as under:

PW-1 Raju Babulal Patwa identified and involved A1, A2, A3, A4 and A6.

PW-2 Bhupendara Jani identified and involved A-6

PW-3 Nareshmukar @ Sonu Sindhi involved and identified accused Nos. 1 and 2.

PW-4 Abhaykumar Ramsing has identified and involved accused Nos. 1 to 7. However, he involves accused Nos. 1 and 2 having revolver in their hands and accused Nos. 3 and 4 were having sword in their hands.

20. From the evidence of the above witnesses it is clear that all the witnesses are residing in the said locality, in the vicinity of the scene of offence since many years and that they are visiting the temple daily and that they used to know the accused and therefore, we do not find any difficulty on the part of these witnesses to identify the accused. In fact, the complainant in his evidence has admitted that accused Nos. 2, 3 and 4 are his neighbours staying in the same chawl and he knew them since childhood. Thus, the prosecution has clearly established the presence of the accused and their involvement in the offence. From the evidence of PWs it is also clear that the prosecution has not established the case against accused Nos. 5 and 7 that they were also having deadly weapons in their hand. None of the witnesses involves accused Nos. 5 and 7 of their directly or indirectly involvement in the incident, except PW 4 Abhaykumar Ramsing who identified them as members of the mob. However, there is no evidence regarding their active participation in the offence.

21. Dr. Arpit Patel, PW-13, at Exh. 71 who examined injured Naresh @ Sonu Sindhi proved injury by producing injury certificate at Exh. 72. From the injury certificate at Exh. 72, it appears that injured Naresh was treated as an indoor patient and was discharged from the hospital on 29.12.1992 i.e. on the next date. According to the said certificate the injured received punctured wound over the posterior aspect of right elbow.

22. From the evidence of Dr. Dilip Trivedi, PW-14, at Exh. 74 the prosecution has proved the injury by producing injury certificate of the injured Bhupendra Jani. The said certificate shows that injured Bhupendra Jani has received as many as 7 injuries on the left side of the back side of the chest at scapular angle and one

injury was on the lower part of the left scapular border which was muscle deep injury, one injury was muscle deep on the right side back of the chest and the other was on the scalp and back of abdomen. He also noticed fracture on the left side of the chest. According to him, there were injuries on the skull and abdomen. He has clearly deposed that the injuries caused were fresh and grievous in nature. After seeing the muddamal article nos. 4(1), 5(1) and 5(2), according to him, the injuries received by the victim Bhupendra Jani were possible by the said muddamal articles.

23. After having minutely examined the medical evidence on record, we are clearly of the opinion that the medical evidence is in conformity with the evidence of the PWs and more particularly the injured witnesses. In our opinion, the evidence of the witnesses gets corroboration from the injury certificate as well as oral evidence of the doctors and in that view of the matter, we are convinced, beyond any manner of doubt, that the prosecution has established that the injuries received by Bhupendra Jani were possible by the sharp cutting instruments like sword. Even though the learned trial Judge has observed that the injury sustained by Sonu Sindhi is not proved by the prosecution. However, the injury was also possible as a result of bullet injury. We also endorse the said finding. This is particularly, in view of the fact that Sonu Sindhi has sustained punctured wound injury which in our opinion is not possible with weapons like sword used by the accused.

24. The punch witness Ghanshyam A. Patel, PW-7, at Exh. 38 in the instant case has proved panchnama at Exh. 39 which is a seizure panchnama of the revolver produced by accused No. 2 Gulabkhan Amirkhan. We have gone through the evidence of Panch Ghanshyam A. Patel. In our opinion he has successfully stood the test of cross-examination. Since his evidence gets support from the Investigating Officer, we accept the evidence of panch and hold that prosecution has established the seizure of revolver used by accused No. 2. Likewise, prosecution has, in the instant case, also established panchnama at Exh. 49 which is seizure of swords used by accused Nos. 3 and 4 through the evidence of Vijaysingh Chauhan, PW-10, at Exh. 48 who has fully supported the prosecution.

25. From the evidence discussed above, we are clearly of the opinion that the prosecution has established that the accused Nos. 1, 2, 3, 4 and 6 had deadly weapons in their hands and they used the same to commit the crime in

question. Merely because the prosecution has not recovered pistol used by accused No. 1, it is not possible for us to accept the submission that accused No. 1 is wrongly involved in the case.

26. From the evidence on record, in our opinion, the prosecution has proved the presence of all the accused at the time of the incident and also participation of accused Nos. 1, 2, 3, 4 and 6. In this view of the matter, we see no merits in the submission advanced by Mr. Bukhari, learned counsel for the accused. We accordingly confirm the order of conviction passed against accused Nos. 1, 2, 3, 4 and 6 by the trial judge.

27. Learned Advocate Mr. Bukhari, however, submits that all the accused have undergone substantial period of sentence. According to him, accused No. 6 has in fact undergone the sentence awarded to him and he has not, in fact, preferred any appeal. He therefore submits that since other accused who have preferred appeal are on bail and since they are settled in their life, it would be harsh for them to complete the remaining part of their sentence. He therefore submits that a lenient view may be taken in the matter by giving relief in the order of sentence. Mr. Gohil, learned A.P.P. has strongly opposed the submission advanced by the learned counsel for the accused.

28. After having given anxious thought in the matter, we do feel that the incident in question has taken place out of anger and hatred shown by a particular community to the other community. Instead of showing respect and tolerance to the other community, the accused attacked PWs who were unarmed and were returning after attending "Aarti" in the temple. Therefore, the accused did not deserve any leniency as far as sentence is concerned. However, by sending them again to jail may further aggrevate or develop communal ill-will and hatred and the same may also disturb their routine life and this will adversely affect the family of the accused. Thus, taking into consideration the facts and circumstances of the case we feel that if the amount of fine is increased substantially, to be paid to the injured PWs, the ends of justice shall be met with. In the result, we pass the following order:

(i) The judgement and order of conviction dated 22.12.1995 passed by the learned trial Judge against accused Nos. 1,2,3,4 and 6 for the offences under Section 147, 148, 188 read with Section 149, 307 read with Section 149 of I.P.C.

and conviction of accused No. 2 for the offence under Section 25(1)(a) and (b) of the Arms Act is confirmed. We however, alter the substantive sentence imposed upon them by the trial Court to the period already undergone by them and we increase the amount of fine from Rs. 1500/- to Rs. 3000/-. We direct that the accused to pay the amount of fine within a period of four weeks from today failing which the sentence imposed by the trial Court will set restored. It is clarified that accused No. 6 who has already served out the full sentence is not required to pay the increased fine nor is he required to surrender to custody. The order of conviction of each of the accused for the substantive offence under Section 307 read with Section 149 is confirmed. There will be no separate sentence for the offence punishable under Section 147, 148, 188 and Section 147 of I.P.C. and under Section 25(1)(a) and (b) of the Arms Act as far as accused No. 2 is concerned.

(ii) The fine of amount, if paid by the accused be paid to the injured Bhupendra Jani and Nareshkumar @ Sonu Sindhi at the ratio of 75:25

(iii) The bail bond of the accused shall stand cancelled after a period of four weeks to enable them to deposit the amount of fine. In other words, if the amount of fine is not deposited within four weeks from today, the accused shall be taken in the custody.

29. In the result, Criminal Appeal No. 1182 of 1995, Criminal Appeal No. 73 of 1996 and Criminal Appeal No. 74 of 1996 are partly allowed as far as sentence is concerned. Criminal Appeal No. 171 of 1996 filed by the State is dismissed.

(K.R. VYAS, J)

(K.M. MEHTA, J)

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